

APR 13 1954

In the Supreme Court of the United States

WILLEY, Clerk

OCTOBER TERM, 1953**No. ~~601~~ 33****UNITED STATES OF AMERICA,*****Petitioner,*****v.**

**MICHAEL P. ACRI, DOLLAR SAVINGS & TRUST CO., THE
DOLLAR SAVINGS & TRUST CO. OF YOUNGSTOWN, OHIO,
GUARDIAN OF THE ESTATE OF MICHAEL P. ACRI, and
EDWARD ORAVITZ, ADMINISTRATOR OF THE ESTATE OF
JOHN ORAVEC, a.k.a., ORAVITZ, DECEASED.**

**ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT.**

**BRIEF OF RESPONDENT, EDWARD ORAVITZ,
ADMINISTRATOR OF THE ESTATE OF JOHN
ORAVITZ, DECEASED, OPPOSING CERTIORARI.**

JOHN A. WILLO,
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In the Supreme Court of the United States

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No. 641

UNITED STATES OF AMERICA,
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MICHAEL P. ACRI, DOLLAR SAVINGS & TRUST CO., THE
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**BRIEF OF RESPONDENT, EDWARD ORAVITZ,
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ORAVITZ, DECEASED, OPPOSING CERTIORARI.**

The Circuit Court of Appeals for the Sixth Circuit affirmed a judgment of the U. S. District Court for the Northern District of Ohio, Eastern Division, declaring an attachment lien, duly perfected in a State court action for wrongful death and resulting in judgment therein, to be superior to a lien for income taxes filed subsequent to the attachment, the District Court following the Ohio law that such attachment is an "execution in advance" under the Ohio statutes and superior to liens subsequently filed.

STATEMENT OF FACTS.

On February 17, 1947, Michael P. Acri shot and killed John Oravec while the latter was partaking of refreshments at the Acri Tavern. Found guilty of murder, he was sentenced to a life term at the Ohio State Penitentiary. Surviving are Oravec's parents, of whom he was the sole support.

Acri and his wife were possessed of considerable property; but the most liquid assets were cash savings and Government bonds contained in a safe-deposit box at the vault of the Dollar Savings and Trust Company in the name of Acri, discovered by Mr. John Willo, Counsel for the administrator of the Oravec estate.

On August 6th, 1947, suit for wrongful death was filed in the Court of Common Pleas of Mahoning County, and on the same day an attachment of the funds and securities at the Dollar Savings and Trust Co. was issued and service had on garnishee.

On January 19, 1949, on trial before Judge Doyle, judgment in the sum of \$18,500 was rendered in favor of the administrator suing on behalf of Oravec's parents. The journal entry reads in part:

"The Court further finds that by an attachment proceeding duly commenced in this action on the 6th day of August, 1947, the plaintiff acquired a valid lien upon the monies, bonds, credits and other property belonging to the defendant, particularly, the monies, bonds and valuables contained in No. 710 box at the safety deposit vault of the Dollar Savings and Trust Co. of Youngstown, Ohio: that said lien is a valid and subsisting lien upon said property, as of said 6th day of August, 1947, and for the full payment and satisfaction of the judgment entered herein."

Subsequent to the attachment for wrongful death on August 6th, 1947, the Commissioner for Internal Revenue

had assessed taxes against Acri for the years 1942 to 1946. The assessment list covering these taxes was received by the Collector of Internal Revenue, and Demand for Payment was mailed to Acri on **November 11, 1947.**

On **November 21, 1947**, a tax lien was filed in the office of Recorder of Mahoning County, Ohio, and on the same date notice of tax lien and notice of levy were served upon The Dollar Savings & Trust Company.

On **June 14, 1948**, The Dollar Savings & Trust Company was appointed guardian of the estate of Michael P. Acri, who had been incarcerated upon his conviction for the murder of Oravec.

ARGUMENT.

Whether the lien of an attaching creditor under the provisions of the Ohio Statutes has priority over Federal tax liens assessed, levied and recorded subsequently to the date of the attachment lien.

NATURE OF ATTACHMENT LIEN UNDER OHIO STATUTES.

The nature of an attachment has been stated to be a "direct appropriation by authority of law of specific property of the debtor, for the purpose of satisfying the demand, and the *lien thereby created is substantial and enduring, as much as a mortgage or pledge.*" 5 Am. Jur. p. 87, Sec. 815.

The Ohio General Code, section 11837, provides:

"An order of attachment shall bind the property attached from the time of service. A garnishee shall be liable to the plaintiff in attachment for all property of the defendant in his hands, and money and credits due from him to the defendant, from the time he is served with the written notice."

The absoluteness of an attachment lien under the Ohio statute, as distinguished from being a mere inchoate right to lien or *lis pendens*, is stated by the Ohio Supreme Court in *Rempe v. Ravens*, 68 O. S. 113 at 128:

"The writ of attachment or garnishment is in the nature of an 'execution in advance' and the office and purpose of such writ is to hold and bind the property seized until final judgment in the attachment proceeding, and if upon final hearing in the attachment suit judgment is rendered in favor of the plaintiff, the effect of such judgment is to give plaintiff the right to enforce any lien he shall have acquired by his attachment or garnishment against whatever interest the defendant may have in the property attached or garnished."

The opinion of Justice Minton in *United States v. Security Trust* (1950), 340 U. S. 47, 95 L. Ed. 53, founded on the California statute and the decisions construing it, does not harmonize with the laws of Ohio. There is no decision in Ohio which holds an attachment lien to be only a contingent or inchoate right, a mere *lis pendens*, which gives it no priority over a subsequent lien. An attachment in Ohio is considered a proceeding in rem, the lien whereof prevails over subsequent liens unless released or the main action dismissed. *Pilgrim Distributing Corp. v. Galsworthy*, 148 O. S. 567; *St. John v. Parson*, 54 O. App. 420; *Oil Well Supply Co. v. Koen*, 64 O. S. 568. "The attaching creditor acquires from the levy a right to have the property held by the attaching officer, and under subsequent order, a right to have the property sold." 4 O. Jur. p. 201, sec. 158.

When an order of attachment is issued and executed by seizure, the levy gives rise to a lien. The General Code of Ohio, Sec. 11837, specifically provides that "an order of attachment shall bind the property attached from the time

of service." *Liebman v. Ashbaker*, 36 O. S. 94; *McCombs v. Howard*, 18 O. S. 422. "The lien of the attachment does not depend upon the sufficiency of the affidavit, but upon the taking of the property under the writ." *Benedict v. Peters*, 58 O. S. 527 at 536; 4 O. Jur. p. 202, sec. 159.

The procedure of determining priorities in attachment cases is provided by Sec. 11858, G. C. of Ohio. A trial of the claimant's right to the property can be had only at the instance of such claimant. 4 O. Jur. p. 250, sec. 192. Section 11859 G. C. of Ohio further provides:

"When several attachments are executed on the same property, or the same person is made garnishee by several parties, on motion of any of the plaintiffs the court may order a reference to ascertain and report the amounts and priorities of the several attachments."

See also 4 O. Jur. p. 248, secs. 190 to 192.

INAPPLICABILITY OF CALIFORNIA LAW.

The California attachment statute differs materially from the one in Ohio and the decisions interpreting the former have no application to the latter. The California Code of Civil Procedure, section 537, subjects the property attached "as security for the satisfaction of any judgment that may be recovered," whereas the Ohio statute, G. C. 11837, provides that "an order of attachment shall bind the property attached from the time of service." No lien is expressly provided by the California statute when the property attached is personal property, although a lien is provided by section 542a when the attachment is on real property, upon the recording of a copy of the writ together with a description of the property attached. As to attachments on personal property, section 542b provides:

"An attachment or garnishment of personal property
* * * shall cease to be of any force and effect and the

property levied on be released from the attachment or garnishment at the expiration of three years after the issuance of the writ of attachment under which said levy was made."

Construing the California statute in an attachment on real property, in the case of *United States v. Securities Trust and Savings Bank, etc.*, 340 U. S. 47, 95 L. Ed. 53, Mr. Justice Minton stated:

"The attachment lien gives the attachment creditor no right to proceed against the property unless he gets judgment within three years or within such extension as the statute provides. Numerous contingencies might arise that would prevent the attachment lien from ever becoming perfected by a judgment awarded and recorded * * *. He had a mere caveat of a more perfect lien to come."

Inasmuch as the Government depends upon the decision of the above cited California case, we believe it will aid the Court for us, at this time, to quote further from Mr. Justice Minton's decision:

"The effect of a lien in relation to a provision of federal law for the collection of debts owing the United States is always a federal question. Hence, although a state court's classification of a lien as specific and perfected is entitled to weight, it is subject to re-examination by this Court. On the other hand, if the state court itself describes the lien as inchoate, this classification is 'practically conclusive.' *Illinois vs. Campbell*, 329 U. S. 362, 371. The Supreme Court of California has so described its attachment lien in the case of *Puissecur vs. Yarbrough*, 29 Calif. 2d 409, 412, by stating that 'the attaching creditor obtains only a potential right or a contingent lien.' Examination of the California statute shows that the above is an apt description. * * *"

PRIORITY OF ATTACHMENT LIEN.

The holder of a mechanic's lien, though ordinarily not a "mortgagee, pledgee, purchaser or judgment creditor" within the meaning of Sec. 3672 (2) U. S. C., was held in the *Taylorcraft case*, *U. S. v. Martin Fireproofing Corp.* (C. C. Ohio 1948), 168 Fed. (2) 808, to have priority over a subsequent income tax lien. See also *Re Carswell Construction Co.*, 13 Fed. (2) 667. Other decisions are of similar effect and give an attachment lien, perfected prior to the filing of an income tax lien, priority over the latter; *Louisiana State University v. Hart* (1946), 210 La. 78, 174 A. L. R. 1366; *United States v. Yates* (Tex. 1947), 204 S. W. (2) 399. These cases, distinguishing the *Mackenzie* case (C. C. 9, Cal.) 109 Fed. (2) 540, proceed upon the theory that the nature of the rights flowing from an attachment must be determined by the law of the state. *Spokane County v. United States*, 279 U. S. 80, 73 L. Ed. 621; *United States v. Waddill*, 323 U. S. 353, 89 L. Ed. 294; *New Orleans v. Harrell*, 134 Fed. (2) 399; *United States v. Texas*, 314 U. S. 480, 86 L. Ed. 356, cited in *Louisiana University case*, *supra*. The same rule was applied to liens under Sec. 3466 (U. S. C. Sec. 191, Title 31) for "debts due to the United States." *United States v. Canal Bank* (C. C. Me.), 3 Story 79, Fed. Cas. No. 14,715; *U. S. v. Collins* (C. C. N. Y.), Fed. Cas. No. 14,834; *U. S. v. Mechanics Bank* (D. C. Pa.), Fed. Cas. No. 15,756; *Hopkins vs. Duffy* (Pa.), 9 Lanc. Bar 125; *United States v. Acres* (Mo. 1947), 73 Fed. Sup. 820.

It was also ruled by the Attorney General (1823), 1 Op. A. G. 616, that the priority of the United States cannot reach back over any valid lien, whether it be general or specific.

In the instant case *there is no lack of specificity in the lien perfected by the attachment; the moneys and se-*

curities have been specifically levied on and the attachment lien affected as provided by statute, before the Government has taken any steps to assert its lien.

PRIORITY OF "DEBT DUE UNITED STATES."

Section 3466 of the Revised Statutes, 31 U. S. C. A. sec. 191, provides that all debts owed to the government shall have a prior right to being paid first. This statute is wholly inapplicable, because at the time we obtained our levy under the attachment there was no debt due the United States for income taxes, nor lien effected therefor under the provisions of the Internal Revenue Act, sections 3670, 3671 and 3672, 26 U. S. C. A. No priority or lien for the tax could be claimed until the collector of internal revenue has received the assessment list, made demand for payment upon the taxpayer, and filed the notice of lien at the office of the county recorder. In our case all of this statutory procedure was subsequent to the attachment and therefore no debt or lien existed in favor of the government at the time our attachment was perfected.

Furthermore, the priority provided by section 3466 applies only to insolvency cases. It has been held that this section does not give priority to a tax claim, or creates a lien in favor of the Government, in the absence of insolvency of the taxpayer. *Winston-Salem v. Powell Paving Co.* (1937), 7 Fed. Supp. 424; *Bishop v. Black* (1951), 64 S. E. (2) 167; *Re Rowe Bros.*, 18 Fed. (2) 658; *Tildestly Coal Co. v. American Fuel Corp.* (1947), 130 W. Va. 720, 45 S. E. (2) 750; *U. S. v. Fisher*, 2 Cranch. 358, 2 L. Ed. 304, opinion by Marshall, C.J. See also 6 *Am. Jur.* p. 873, sec. 548 and cases in Annotation 83 L. Ed. 1239, where liens obtained by execution levies were held superior to the claim of the United States for income taxes. In Ohio, as previously shown, an attachment is treated as an execution in advance.

OPERATIVE EFFECT OF ATTACHMENT LIEN.

It is well recognized in the great majority of jurisdictions that an attachment properly obtained either by seizure or garnishment proceedings creates a specific lien which operates on the property concerned from the date of service of the writ of attachment. 7 *Corpus Juris Secundum*, Sections 254, 255, p. 430 *et seq.*; 5 *American Jurisprudence*, Section 825, p. 93. In Ohio this rule clearly prevails by force of the provisions of Ohio General Code Section 11837, that "*an order of attachment shall bind the property attached from the time of service.*"

This statutory rule was recognized and reiterated in *Ohio Auxiliary Fire Alarm Co. v. Heisley* (Circuit Court of Cuyahoga County, 1893) 7 C. C. 483; 4 C. D. 691, wherein the first syllabus provides in part:

"The service of a writ of garnishment upon a party claimed to be indebted to the defendant binds in his hands the property he may have belonging to the defendant at the time he is served with the writ."

And in *Malkey v. Ruggles* (1923), 24 O. N. P. (N. S.) 433, 434, it was stated that "under the provisions of General Code an attachment is a lien from the time of seizure."

The Supreme Court of Ohio at a very early date announced the rule that contests involving priorities between attachment and other lien claims were to be determined by application of the maxim, "*qui prior est tempore potior est jure.*" *Shorten v. Drake* (1882), 38 Ohio St. 76. It was followed by Justice Minton in the *New Britain* case (Adv. Rep. U. S. L. Ed. Vol. 98, p. 289). This priority of time rule has been applied in holding an attachment lien to be superior to a subsequently issued execution. *Malkey v. Ruggles*, 24 O. N. P. (N. S.), 433. It has also been held that an attachment lien is superior to an unrecorded mort-

gage. *Wright, et al. vs. Franklin Bank, et al.*, 59 Ohio St. 80.

From the foregoing it appears indisputable that the attachment lien of the administrator is superior to the general lien of the United States for income taxes in the instant matter since the attachment lien was obtained some three months before the Collector of Internal Revenue either received the assessment lists, demanded payment of delinquent taxes from Aciri, or filed the applicable Notice of Tax Lien. This concept has been applied in the following decisions which concern the precise question presented herein.

In the case of *Louisiana State University vs. Hart*, (Louisiana Supreme Court, 1946), 210 La. 78, 26 So. (2d) 361, 174 A. L. R. 1366, the University brought suit for \$75,000 on an alleged overpayment for furniture purchased from one Smith. The suit was filed on July 25, 1939, and a writ of attachment was issued the same day.

On February 13, 1940, the United States Commissioner assessed income taxes, penalties and interest in the amount of some \$305,000 against Smith for the years 1936, 1937 and 1938. On February 15, 1940, the Collector of Internal Revenue received the Commissioner's assessment list and on the following day filed proper notices of tax liens. Subsequent to this time the University recovered judgment in the amount of \$25,000 against Smith.

In the suit which ensued on the question of the priority of the University's lien over that of the Government's for income taxes, the Court held as follows in the fourth syllabus of the A. L. R. report:

"A federal tax lien for income taxes and penalties arising between the date of attachment of the tax debtor's property and the date of judgment, which maintained it, is subordinate to the lien resulting from

the attachment, and the attaching creditor is to be preferred to the United States in the disposition of the proceeds of the property seized under the writ of attachment."

In the case of *United States v. Yates* (Texas Court of Civil Appeals, 1947) 204 S. W. (2d) 399, the plaintiff, Yates, brought an action to recover judgment against one Russell, for amounts due for rent of equipment and labor on a construction job. The United States intervened, claiming prior liens on the basis of Russell's delinquent taxes. The facts reported disclosed that Yates perfected an attachment lien on May 15, 1944, while the Government did not file its Notice of Tax Lien until May 26, 1944. The Court, in affirming judgment for Yates on his attachment lien, held in the second syllabus:

"A specific attachment lien, levied on airport construction contractor's property before date on which Federal Government fixed its tax lien on proceeds of sale of attached property, was entitled to priority over government's lien, though attaching creditor's claims were not reduced to judgment."

In this regard it will be noted that in *Louisiana State University v. Hart*, 210 La. 78, 26 So. (2d) 361, 174 A. L. R. 1366, *supra*, the Court at page 1370, A. L. R. report, said:

"The United States relies on the case of *Mackenzie v. United States*, 109 F. (2d) 540, but a reference to that case shows that the lien of the government arose prior to the issuance of the attachment, while in this case it arose subsequent to the attachment."

And in *United States v. Yates*, 204 S. W. (2d) 399, *supra*, the same distinguishing factor is both apparent and was noted by the court.

CONCLUSION.

The undisputed facts developed in this case clearly establish that by virtue of the defendant administrator's diligence in attempting to protect the rights of the beneficiaries of his decedent's estate,—he has succeeded in establishing a valid lien under the law of the State of Ohio to the extent of \$18,500, which is prior in time not only to the lien of the United States provided for under the Internal Revenue Code, but prior to any assessment and demand made against Acri for his delinquent income taxes. The administrator's lien, as thus established, being prior in time, is therefore prior in right under the established law.

The Government is relying upon the opinion of Mr. Justice Minton in *United States v. Security Trust, supra*. Sufficeth to say that there was no appearance or briefs filed on behalf of the defense in that action, the proceedings there before the Supreme Court were absolutely *ex parte*.

The lien under the Ohio law is absolute and not contingent upon being enforced within three years as provided by the California Statute. To apply the California law in the instant case would amount to a repeal and annulment, by judicial fiat, of the Ohio statutes relating to priorities of lien in attachment cases, contrary to the well established principles by the decisions of both the Supreme Courts of the United States and the State of Ohio. (See Conformity Rule 64, Rules of Civil Procedure, U. S. C. A. Title 28.)

In the words of the District Court:

“Under Ohio law, Oravitz acquired a valid lien of the requisite specificity on Acri's property as of the date of the commencement of the attachment proceeding. Ohio General Code Section 11837. *Illinois v. Campbell, supra*.

The subsequent receipt of the assessment list by the Collector and the filing of an income tax lien by him accords the Government's lien only second place. 26 U. S. C. Section 3671.

The case of *U. S. v. Security Trust and Savings Bank*, *supra*, relied upon the Government, dealt with a California statute giving no such effectiveness to attachment proceedings and liens as does the Ohio statute.

The Ohio courts have characterized the attachment lien under Ohio law as an 'execution in advance,' *Rempe & Son v. Ravens*, 68 O. S. 113; *Green v. Coit*, 81 O. S. 280, and accord it equal standing with an execution lien. *Shorten v. Drake*, 38 O. S. 76. Thus they treat the attachment lien as perfected at the time the attachment is made.

In the interest of orderly administration of justice in matters of concurrent jurisdiction, this Court should respect the state court's characterization of the attachment lien under Ohio law."

This case differs from the case of *United States v. Gilbert Associates*, 345 U. S. 361, where a specific federal tax lien was given priority over a general town lien for taxes in the distribution of an insolvent estate; or the *Security Trust case*, 340 U. S. 47, where no lien existed under the California law in an attachment of personal property; or the *New Britain case* (Advance Reports of U. S. Supreme Court, Law Edition, Vol. 98, p. 289), where the federal lien was perfected before the statutory lien of a city, the Supreme Court in the latter case basing its decision on the principle of "first in time, first in right."

Since justice must be equal to all, it would seem that the principle should be equally applied to the attachment lien here, perfected and lodged against specific property long before any steps have been taken by the government to assert its claim. The very language of Mr Justice

Minton in the *New Britain* case, *supra*, that "a prior lien gives a prior claim which is entitled to prior satisfaction out of the subject it binds," permits no other conclusion. He further observed that "Congress had this cardinal rule in mind when it enacted Section 3670." The Government had neither a debt nor lien at the time the property was attached. No federal question decided in conflict with applicable decisions of this Court, as contemplated by Rule 38 of this Court, is here involved and the petition for certiorari should accordingly be denied.

Respectfully submitted,

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